Commonwealth of Massachusetts
State Ethics Commission

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SUFFOLK, ss. **COMMISSION ADJUDICATORY DOCKET NO. 556**

IN THE MATTER OF JAMES H. QUIRK, Jr.

Appearances: Laurie Ellen Weisman, Esq.
Counsel for the Petitioner

David A. McLaughlin, Esq.
Counsel for the Respondent

Commissioners: Brown, Chair., Larkin, Rapacki, Moore, Liacos

Presiding Officer: Commissioner Lynne E. Larkin

DECISION AND ORDER

I. INTRODUCTION AND PROCEDURAL HISTORY

On August 8, 1996, the Petitioner initiated these proceedings by issuing an Order to Show Cause (OSC). *See* 930 C.M.R. §1.01(5)(a). The OSC alleges that the Respondent, James H. Quirk, Jr. (Quirk), while he was a member and chairman of the Town of Yarmouth's Conservation Commission (ConCom), violated G. L. c. 268A, § 17(a) by receiving a fee from private landowners for their lawsuit against the Town for damages for land taken by eminent domain for conservation purposes. The specific allegation is that he "received compensation from someone other than the town in relation to a particular matter in which the town had a direct and substantial interest, and in which Quirk had participated as a Conservation Commission member, and/or for which he had official responsibility within the prior year." In addition, the OSC alleges that Quirk violated G. L. c. 268A, § 17(c) by acting "as attorney for someone other than the town in prosecuting a claim against the town, and in connection with a particular matter in which the town had a direct and substantial interest, and in which Quirk participated as a Conservation Commission member, and/or for which he had official responsibility within the prior year."

On August 29, 1996, the Respondent filed an Answer in which, among other things, he asserted an affirmative defense of statute of limitations. On May 1, 1998, the Respondent filed a motion to dismiss the OSC and supporting memorandum (Motion), arguing that the statute of limitations bars all of the allegations against him. The Petitioner filed its opposition to the Motion on May 11, 1998. The Respondent and the Petitioner presented oral arguments on the Motion before all five members of the Ethics Commission on July 22, 1998.

II. FINDINGS

Based upon the joint Stipulation of Facts and other evidence the parties submitted in connection with the Motion, we find as follows:[2/]

1. Quirk was a member of the ConCom from April 15, 1986 through June 30, 1994. As a member of the ConCom, he was a "special municipal employee" as defined in G. L. c. 268A, § 1(n).

2. During his tenure on the ConCom, Quirk was also a practicing attorney who had a general law practice that included eminent domain cases.

3. As a result of a Special Town Meeting on January 7, 1987, the Town's voters authorized the Board of Selectmen "to acquire by purchase, gift or eminent domain for conservation purposes parcels of land," including, among other parcels, land owned by Thomas M. and Nora C. King (Kings).

4. On March 5, 1987, the ConCom, including Quirk, met in an executive session and voted to request that the Town acquire for conservation purposes the land authorized by the January 7, 1987 Special Town Meeting, including land owned by the Kings.[3/]

5. The Board of Selectmen filed an Order of Taking by Eminent Domain, which included the Kings' land, on or about December 14, 1987, with the Barnstable County Registry of Deeds.

6. On or about December 23, 1987, the Kings met with Quirk and hired him to represent them in a lawsuit against the Town. On March 31, 1988, Quirk filed suit on behalf of the Kings, seeking compensation for the land taken. From that date through March 25, 1994, which was the date of execution on judgment in favor of the Kings in the amount of $376,911.66, Quirk, as the Kings' attorney, filed various court papers, corresponded with counsel for the Town and generally pursued his clients' claim against the Town. Quirk received $122,934.81 in fees for representing the Kings.

7. During the course of the litigation, the Board of Selectmen proposed settling the Kings' lawsuit by offering to return the land. On February 6, 1992, at a ConCom meeting which Quirk did not attend, the ConCom met in executive session to approve the Selectmen's proposed offer.[4/]

8. Sometime in early 1992, the Board of Selectmen became concerned that Quirk had a conflict of interest as a result of his being a member of the ConCom while also representing the Kings in seeking damages for land in which the ConCom also had an interest. To address the Board's concerns, the Town obtained an opinion letter dated April 7, 1992 from special municipal counsel concerning Quirk's activities on behalf of the Kings.

9. The following excerpts from the April 7, 1992 opinion letter are relevant:

> This opinion relates to the activities of James H. Quirk, Jr. who is coincidentally acting as counsel for Thomas M. King in connection with a land damage action against the Town of Yarmouth (Barnstable Superior Court Civil Action Number 88-286) while a member (current Chairman) of the Conservation Commission of the Town of Yarmouth. . .

[O]n December 14, 1987 the Town went to record with a taking of land in which Thomas M. King and Nora C. King purportedly held an interest. The instrument of taking was recorded in Barnstable County Registry of Deeds . . . . The so-called King property was a portion of a larger parcel taken by eminent domain for conservation purposes. . . . No pro tanto award was paid at the time of the taking.

The Kings commenced the land damage action against the town in April 1988. . . .

It appears . . . that Mr. Quirk never participated in the process of selecting the King property as a candidate for taking action by the Board of Selectmen, nor did he participate in the process of recommending a taking of the King property. In adition, the Kings have never sought any action by the Conservatioon Commission relative to this land, The Board of Selectmen, unbeknownst to Mr. Quirk, having solicited the concurrence of the Conservation Commission, which obviously acted without the participation of Mr. Quirk, made a subsequent determination that the King property was not significant for conservation purposes and has offered to return the property to the Kings. This offer was proffered to the Kings via a letter of Town Counsel, . . . to . . . Quirk, as counsel for the Kings, dated February 14, 1992.

Mr. Quirk has not participated in any actions by the Commission or the Town, upon which the Town subsequently determined that the King property is not significant for conservation purposes and offered to return the land to the Kings.

Mr. Quirk is a 'special municipal employee' as that term is defined and employed in G. L. c. 268A, and there is no suggestion that his service involves more than sixty days service in any consecutive three hundred and sixty-five days. I do not find, based upon the foregoing specific facts, that Mr. Quirk has participated in the King matter as a member of the Conservation Commission or that Mr. Quirk has exercised official responsibility over any action pertinent to the particular facts set forth.

10. The April 7, 1992 opinion letter was filed with the Ethics Commission in June, 1992.

11. Andrew Crane, then Executive Director of the Ethics Commission, issued an opinion letter dated June 19, 1992 that states:

Pursuant to the Commission's municipal advisory opinion regulation, 930 C.M.R. 1.03(3),[5/] we have reviewed your opinion of April 7, 1992, and subsequent letters, concerning Conservation Commission Chairman James H. Quirk, Jr.

Assuming (as you represent) that as a Conservation Commission member Mr. Quirk is a 'special municipal employee' who does not serve more than 60 days in any relevant 365-day period, G. L. c. 268A, §17 prohibits him from acting as agent or attorney for, or receiving compensation from, anyone other than the Town in relation to any particular matter in which the Town is a party or has a direct and substantial interest, and either (a) in which he participated, or (b) which has been the subject of his official responsibility within one year. Your opinion states that the Conservation Commission concurred in the Selectmen's offer to return the subject property to the Kings, although Mr. Quirk did not participate. Nonetheless, the matter was under his 'official responsibility' merely by the Commission's having authority to make recommendations

about it to the Selectmen while he was a Commission member. *EC-COI-87-17*. You have been unable so far to learn when the Commission last had such authority about this matter.

Therefore, Mr. Quirk may not act as attorney for, or receive compensation from, any private party (including Thomas King), in relation to this land taking, for one year after the Commission last had (or has) authority to make recommendations about.

III. DECISION

Respondent argues that the OSC should be dismissed because the OSC issued more than three years after the Petitioner had knowledge or should have had knowledge of the alleged violations. In so arguing, the Respondent has emphasized the following portion of the Commission's statute of limitations regulation, 930 C.M.R. §1.02(10)(a): "An order to show cause must be issued within three years after a disinterested person learned of the violation."

This three year tort statute of limitations adheres to principles described in *Nantucket v. Beinecke*, 379 Mass. 345, 349-351 (1979). *See also Zora v. State Ethics Commission,* 415 Mass. 640, 647-648 (1993). *Beinecke* holds that the statute of limitations begins to run when a disinterested person capable of acting on behalf of the plaintiff to enforce the conflict of interest law knew or should have known of the wrong. *Id.* at 350-351.

Applying the general principles of *Beinecke* and the Commission's regulation to this case, the Petitioner must establish by a preponderance of the evidence that it did not know, nor should it have known, of the alleged violations more than three years prior to the issuance of the OSC. Under the Commission's regulation, once the Respondent raises the statute of limitations defense, the Petitioner may satisfy its burden by filing affidavits from the Enforcement Division's investigator responsible for the case, the Attorney General and the appropriate Dist-rict Attorney's Office stating, respectively, that no complaints relating to the violation were received more than three years before the OSC issued. 930 C.M.R. § 1.02(10)(c)(1) & (2). *See e.g., In re Smith* 1998 SEC Docket No. 522 (Memorandum and Order April 22, 1998); *In re DiPasquale*, 1996 SEC Docket No. 526 (Memorandum and Order June 11, 1996).

Here, the Petitioner provided the affidavits. The Respondent, however, argues that the record contains other undisputed evidence from which to conclude that the Petitioner knew or should have known of the Respondent's alleged violations prior to August 8, 1993 (three years prior to the OSC). The Petitioner does not deny that the Executive Director of the Ethics Commission had knowledge of some of the relevant facts in 1992 but asserts that the Petitioner did not have knowledge of all of the crucial facts more than three years prior to the date of the OSC. As a result, the Petitioner argues that it did not know of the violations nor should it have known of the violations more than three years before the OSC issued. To resolve that issue, we consider the following legal principles.

To determine when the limitations period commenced, we must evaluate the Petitioner's level of knowledge and its duty to inquire further. "Reasonable notice that a . . . particular act of another person may have been a cause of harm to a plaintiff creates a duty of inquiry and starts the running of the statute of limitations." *Bowen v. Eli Lilly & Co.,* 408 Mass. 204, 210 (1990). The required level of knowledge is not notice of every fact that must be proved to support a claim, but rather knowledge that an injury has occurred. *Pagliuca v. Boston*, 35 Mass. App. Ct. 820, 824 (1994) (although the plaintiff may not have known of the severity of harm she suffered from the defendant's alleged violation of her civil rights until after her breakdown, she knew the

necessary facts to make out a civil rights claim). The inquiry is whether, based on the information available to the Petitioner, a reasonably prudent person in the Petitioner's position should have discovered the cause of action. *See McGuinness v. Cotter*, 412 Mass. 617, 628 (1992). Thus, the cause of action accrues when the Petitioner knew, "or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action." *Gore v. Daniel O'Connell's Sons, Inc.*, 17 Mass. App. Ct. 645, 647 (1984). "The unknown factor, however, must be what the facts are, not the legal theory for the cause of action." *Id. See also Friedman v. Jablonski*, 371 Mass. 482, 485-487 (1976).[6/]

Applying these principles to this case, we conclude the following. We first observe that §§ 17(a) *and* (c) of G. L. c. 268A apply to a special municipal employee in relation to a particular matter *either* "in which he has at any time participated as a municipal employee" *or* "which is or within one year has been the subject of his official responsibility." In this case, the Petitioner pled the alternative theories of the Respondent's participation in *or* official responsibility for the relevant particular matters to support allegations that the Respondent's conduct on behalf of the Kings violated both §§ 17(a) and (c).

As of June 1992, the Executive Director knew that the Respondent was a special municipal employee of Yarmouth as a member of its ConCom while also acting as the attorney for private landowners in a lawsuit against the Town for monetary damages for their land taken by eminent domain.[7/] The Executive Director knew that the ConCom had authority "to make recommendations about [the Kings' property] to the Selectmen." The Executive Director concluded that such authority amounted to the Respondent's official responsibility for the land taking. Acknowledging that the Respondent might request or receive compensation for his services as the Kings' attorney,[8/] the Executive Director, acting on behalf of the Commission pursuant to its municipal advisory opinion regulation,[9/] warned the Respondent in the June 19, 1992 letter that "he may not act as attorney for, or receive compensation from, any private party (including Thomas King), in relation to this land taking . . . ." Thus, the Executive Director and, therefore the Commission, knew or should have known that both §§ 17(a) and (c) were potential causes of action, as of June 1992.[10/]

The Petitioner argues that because the Respondent appears to have received compensation within the three-year limitations period, the alleged violation of § 17(a) occurred less than three years prior to the OSC and is not barred. This argument fails because, as noted above, the Petitioner reasonably should have known more than three years prior to the OSC that the Respondent may have received or requested compensation as the attorney representing clients seeking damages for an eminent domain taking. *See Pagliuca*, 35 Mass. App. Ct. 820, 824. The Petitioner also argues that it had no knowledge, more than three years prior to the date of the OSC, of the Respondent's participation in the March 5, 1987 vote of the ConCom. Again, through the exercise of reasonable diligence based upon what it knew, the Petitioner could have learned of the Respondent's participation in the relevant particular matter. *See Friedman*, 371 Mass. at 486-487.

On this record, therefore, we conclude that the Petitioner knew or should have known of the alleged violations in the OSC more than three years prior to the date the OSC was issued.

IV. CONCLUSION

For all of the above-stated reasons, we conclude that there is no genuine issue of material fact as to whether the Petitioner knew or should have known of the alleged violations more than three years prior to the issuance of the OSC. Accordingly, the Respondent's motion for summary decision based upon the statute of limitations is **GRANTED** and this matter is dismissed.

DATE: September 23, 1998

1/Commissioner Brown is not a signatory to this Decision and Order because his resignation from the Commission became effective prior to its issuance. He did, however, fully participate in the Commission's deliberations and decision in this matter.

2/The parties submitted a joint Stipulation of Facts on December 11, 1996. In addition, the parties have presented evidence outside the pleadings and the Stipulation for purposes of the Motion. As a result, we consider the Motion as one for summary decision. *See* 930 C. M. R. § 1.01(6)(e) & (f).

3/The Respondent disputes that he participated in an executive session of the ConCom on that date, arguing that proof of such facts is barred by *New England Box Co. v. C. & R. Construct'n Co.,* 313 Mass. 696, 702 (1943) and *Town of Dedham v. Frank Gobbi et al.,* 6 Mass. App. Ct. 883 (1978). For the purposes of the Motion, however, he assumes this finding arguendo.

4/The Respondent disputes that the ConCom met in executive session on February 6, 1992 to approve the offer, also based upon the cases cited in note 3 *supra*, but assumes this finding arguendo.

5/We note that 930 C.M.R. §1.03(3) states in pertinent part: "Following receipt of the opinion, the Commission, acting through the Executive Director, shall notify the . . . town counsel of any legal conclusions in the opinion which are inconsistent with Commission conclusions on similar issues under M.G.L. c. 268A or are otherwise, in the Commission's judgment, incorrect, incomplete or misleading."

6/The policies that support imposing a limitations period on actions under the conflict of interest law are the same as those behind any statute of limitations. They "encourage plaintiffs to bring actions within prescribed deadlines when evidence is fresh and available," *Franklin v. Albert,* 381 Mass. 611, 618 (1980) and they "represent a judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 349 (1944)).

7/Section 17(c) states, in relevant part, "No municipal employee shall . . . act as agent or attorney for anyone other than the . . . town . . . in connection with any particular matter in which the same . . . town is a party . . . "

8/Section 17(a) states, in relevant part, "No municipal employee shall . . . receive *or request* compensation from anyone other than the . . . town . . . in relation to any particular matter in which the same . . . town is a party . . . " (emphasis added).

9/See note 5 *supra.*

10/We have considered only the extent of the Executive Director's knowledge in circumstances in which he acted on behalf of the Commission pursuant to 930 C.M.R. § 1.03(3). Thus, we need not, and, therefore, do not, decide the extent to which knowledge of other Commission personnel might trigger the running of the statute of limitations.